

## **LAW ON COMPETITION**

### **Key Terms for Bidders in a Private Procurement**

*17 May 2024*

*Since the 2021 Law on Competition, there are some ground rules for bidders in a private procurement to comply with. One of the main purposes of the requirements is to ensure fair competition among bidders.*

## BIDDING IN A PRIVATE PROCUREMENT UNDER THE LAW ON COMPETITION

A procurement exercise is carried out to serve different purposes and interests, notably for those who launch or participate in the procurement process. For those who organize a procurement activity, their main purpose is to be supplied with goods or services at a lowered cost but with quality assurance. For participants, when participating in a bidding process, fair and equal treatment is generally expected even though they may not obtain the contract.

Cambodian legal framework has evolved on procurement. For long, only the procurement in the public sector has been subject to a throng of legal requirements for both the public entity launching the procurement process and the participant to comply with. Procurement is crucial in the public sector because the public entity is carrying out a business in the interest of the public. For that, ideally, the selection of the suppliers of goods and services is made transparently and fairly to ensure that goods or services are being supplied with cost and quality efficiency. In Cambodia, public procurement was first subject to the 2012 Law on Public Procurement which is now repealed by the 2023 Law on Public Procurement (the “**2023 LPP**”). As its name indicates, the 2023 LPP covers public procurement only. So far, there is no specific provision regulating private procurement.

Since the enactment of the 2021 Law on Competition, participants in private procurement must pay close attention to the legal requirements outlined in the law to ensure compliance. Article 7-5 of the Law on Competition makes illegal the entry into and the implementation of any horizontal agreement, directly or indirectly, affecting competition in a private procurement where bidding aims to favor the bidder to obtain the contract. According to the terms of the law, the following conditions should be met to constitute a violation of Article 7-5 of the Law on Competition:

1. There must be a horizontal agreement;
2. There must be a favoring arrangement;
3. There must be a procurement;
4. The procurement is private; and
5. The arrangement directly or indirectly affects the competition

Article 7-5 applies to a horizontal agreement which is defined by the law as the agreement among those who carry out or may carry out operation at the same level of the chain of production or distribution. Bidders responding to call for tender are at the same level of a distribution chain and thus any agreement among them entered into in breach of Article 7-5 is invalid.

### A. Is a joint submission to the bidding process prohibited?

The very first question that is asked before analyzing the law in detail is whether a joint application to a bidding process is prohibited. There might be circumstances where bidder jointly submit their application to a call for tender as their strength combined is believed to be more justified in terms of capability and cost for delivering a work or goods.

Essentially, the law aims to encourage competition among bidders. So long there is no agreement harming the competition, and all the conditions below are not met, joint bidding in a private procurement should not be prohibited by Article 7-5.

### B. What is a procurement exercise?

The Law on Competition does not provide any detail on what could form a private procurement activity. There is no guideline from the authority on the matter. When a supplier of goods or services receives a request for a proposal, they should clarify if that request is part of a procurement process. Sometimes, the request for proposal indicates clearly that this is a call for tender where different applicants are being approached for a proposal.

In the absence of a detail in the Law on Competition or the request for proposal, it is worth that the person wishing to respond to the call for proposal may refer to the 2023 LPP which details how a public procurement can be conducted:

1. Competitive bidding at the local or international level
2. Other types of competitive bidding methods such as limited competitive bidding, fee consultation, fee survey; and
3. Direct contracts can be done when certain criteria are met.

It is not to say that the 2023 LPP is immediately applicable to a procurement made in private. The 2023 LPP may be used as a reference or benchmark by the authority in the absence of a specific law framing the private procurement activity.

### C. When is a procurement considered private?

The selection of suppliers of goods or services through public procurement is not a concern. The Law on Competition is very express that its Article 7-5 is only applicable to a private procurement. While aiming to ensure competition among bidders in private procurement, the law fails to define the circumstances under which a procurement is deemed to be carried out in a PRIVATE manner. In the absence of guidance provided by the Law on Competition, a reverse approach of law reading can be taken to see how one procurement can be considered as private. In this manner, a procurement can be deemed private if it is not a PUBLIC PROCUREMENT. In this case, the 2023 LPP can shed some light on what makes a public procurement which refers to all procurements to be made by the Procurement Implementing Institutions which are Ministries, institutions,

and institutions that obtain full power to manage its revenues and expenses, the administration of the municipalities, provinces, Srok, Khan, Khum, Sangkat, public enterprises, public institutions having administrative character, and any other entities holding financial autonomy. If a reversing approach of interpretation is taken, any procurement made by entities that are not listed in the LPP is considered a private procurement. So far, such an approach is not confirmed by any legal precedent.

On the other hand, the law applies to all businesses which are defined to include a simple act of supplying or receiving goods or services or disposing of real rights in a real property. The definition of business is very broad. The Law on Competition applies to any private procurement conducted by the following persons:

1. Companies;
2. Non-Governmental Organizations;
3. Development agencies;
4. Association; OR
5. Any entities that are not listed in the 2023 LPP

#### **D. What is considered a favor to a single bidder?**

While in some other countries, some practices such as price fixing, bid suppression, and bid withdrawal without a reasonable ground can be considered anti-competitive practices, the Cambodian law is silent and fails to establish what makes an agreement to favor a single bidder. In any case, essentially, the Law on Competition aims to promote competition, meaning that any agreement eliminating or distorting the competition is not well perceived. As an example, the Law on Competition is very clear that any horizontal agreement aiming to fix or reduce a price is prohibited. This type of restriction should be also observed by bidders.

In any case, as said above, the law requires that there is an agreement among bidders, creating favor for a bidder. Even if it is not mentioned in the law, such an agreement can be in writing or verbal or reflected in action taken in concert by bidders.

#### **E. What happens if the provisions of Article 7-5 are breached?**

If the requirement under Article 7-5 is breached, the following can be anticipated:

1. Temporary measures: If necessary, the investigation officer may, during the investigation period, take temporary measures by requiring a person being subject to the temporary measures, to (1) suspend an agreement's effect and/or terminate any agreement in connection with the violation of Article 7-5; (2) cessation of any activity conducted in connection with the violation of Article 7-2; or to do or not to do any activity.

2. Liabilities: There are two types of liability that bidders can be exposed to:
  - a. Criminal offense: Violation of Article can be subject to the following penalties:
    - i. For an individual, an imprisonment between one month and two years AND a fine between five million Riels and ten million Riels.
    - ii. For a legal person, a fine between one hundred million Riels to two thousand million Riels.
  - b. Civil liabilities: Organizing and participating in a procurement process may be costly for some projects. Those who call for tender and those who participate in the tender process can incur some costs such as fees for consultants, traveling, or even a loss of opportunity. Potentially, bidders who violate Article 7-5 can be subject to different civil liabilities. Any person who incurs loss may seek compensation from the person who violates the law. The law also implies that the loss must result from the violation of the law (Article 37). In fact, according to Article 37, it appears that the prejudiced party does not have to justify the relationship with persons (including the bidders for Article 7-5) violating the Law on Competition or whether they are bound together in a contractual relationship or not. As such, those who organize a procurement process and those who respond to a call for tender can seek compensation from the bidders for violating Article 7-5 of the Law on Competition. There is however a need for justification of the relationship between the loss and the violation of the law.

On a related note, the Law on Competition does not seem to impose limitations as to the type and amount of loss that a party can base on to seek compensation.
  - c. Other administrative measures such as a written warning or revocation of license or incorporation documents can be decided by the authority.

## F. Conclusion

When submitting a fee proposal in response to a request, it is important for bidders (1) to establish clearly if they are entering into a private procurement process, and (2) carefully check the terms and conditions (if any) attached to the call for fee proposal to establish the kind of behavior that can be expected from bidders during the procurement process. For now, the language of the law is generally broad, requiring bidders to be more careful when participating in a procurement process and in the context of potential liability that they can be exposed to when the requirements under the Law on Competition are violated.

*Nothing in this material constitutes or is intended to constitute legal advice which shall be relied on. The material is for general informational purposes only.*

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